

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE REHABILITATION REVIEW PANEL

In the Matter of the Application
of Paul L. Gaston for Registration as
FOR_SUMMARY_DISPOSITION
a Rehabilitation Consultant
Independent/Intern, and

ORDER_DENYING_MOTION

In the Matter of the Applications of
Paul L. Gaston for Registration as a
Rehabilitation Consultant Independent
and for Renewal of Qualified
Rehabilitation Consultant Registration

The above-entitled matters are before the undersigned Administrative Law Judge pursuant to Appellant Paul L. Gaston's Motion for Summary Disposition.

Steven W. Zachary and Calvin L. Scott, Zachary & Scott, 121 North Hamline, Suite 11, St. Paul, Minnesota 55108, appeared on behalf of Appellant. Jon K. Murphy, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, appeared on behalf of the Commissioner of Labor and Industry (Commissioner).

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Appellant's Motion for Summary Disposition is DENIED.
2. The hearing in this matter will be held November 21 and 22, 1991, at 9:30 a.m. at the Office of Administrative Hearings.

Dated this 22nd day of October, 1991.

_____/s/_____

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

At a prehearing conference of July 31, 1991, Appellant asserted that a stipulation reached in a prior matter barred assertion of the misrepresentation alleged in the prior matter as a basis for denying Appellant's subsequent applications for registration. It was agreed that the parties would submit briefs on the issue and that the Commissioner would submit the first brief because he was in a better position to outline the basis for the Commissioner's denial. In their briefs, the parties have styled the matter as Appellant's Motion for Summary Disposition. The last brief was received on September 31, 1991.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rules 1400.5500K; Minn. R. Civ.P. 56.03. It is appropriate where there is no genuine issue as to any material fact. Summary disposition as to any part of a contested case may be granted. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984). The non-moving party has the benefit of that view of the evidence which is most favorable to him and all doubts and inference must be resolved against the moving party. Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988).

Regulatory_Background

A Qualified Rehabilitation Consultant (QRC) is defined in Minn. Rule 5220.0100, subp. 5, as a professionally trained and experienced person approved by the Commissioner to develop and monitor rehabilitation plans for employees entitled to rehabilitation benefits under the Workers' Compensation Act. QRCs may be either "affiliated" with an employer, insurer or adjusting company, or "independent." Under Minn. Rule 5220.1400, a person that meets the education and certification requirements for a QRC, except for the internship or experience requirements for certification, may be registered as a QRC intern and work under the direct supervision of a QRC.

In June 1987, Minn.

Under Minn. Stat. § 176.102, subd. 3a, the Rehabilitation Review Panel (Panel) has authority to discipline QRCs and may impose a penalty of up to \$1,000.00 per violation and may suspend or revoke certification.

Statement_of_Facts

For the purposes of this motion, the facts appear to be as follows:

Appellant had been registered as a QRC since March 7, 1980. In a letter dated December 5, 1988, Appellant represented to the Rehabilitation and Medical Affairs Unit of the Department of Labor and Industry (the Unit) that he had been registered with the Commission on Rehabilitation Counselor Certification (CRCC), a division of the Board of Rehabilitation Certification, in August 1988. He attached a copy of a card from CRCC stating that he must select an examination site by September 30, 1988, and stated that he would submit a copy of the certification document once he received it. Appellant's QRC registration for March 1, 1989 through February 28, 1990, was renewed by the Unit based in part on Appellant's representations.

In December 1989, as part of his annual renewal, Appellant submitted a fraudulent document to the Unit that appeared to be a certificate from the CRCC stating that Appellant had been granted the title of Certified Rehabilitation Counselor. The Unit renewed Appellant's QRC registration for the period of March 1, 1990 through February 28, 1991, based in part upon his representation that the document he submitted had been issued to him by the CRCC.

In January 1990, the Commissioner's representatives learned that Appellant was not certified by the CRCC and initiated disciplinary action through the issuance of a Notice and Order for Hearing and Statement of Charges dated March 9, 1990. The Notice alleged that Appellant had misrepresented that he had passed the certification examination in violation of Minn. Rule 5220.1805 B, misrepresented his credentials in violation of Minn. Rule 5220.1805 B and failed to adhere to policies and procedures developed by the Commissioner in violation of Minn. Rule 5220.1300, subp. 2. The Notice set a hearing before an Administrative Law Judge for April 26, 1990.

In a memo dated March 7, 1990, Appellant notified the Commissioner that he was discontinuing and resigning his registration as a QRC effective April 1, 1990. The parties then entered into settlement negotiations and subsequently entered into a Stipulation of Facts and Order (the Stipulation) that was approved by the Panel on July 12, 1990. The Stipulation recited the facts of the 1988 and 1989 applications and contained the following provisions relevant here:

* * *

4. The Unit alleges that Respondent's actions as enumerated above constitute violations of Minn. Stat. § 176.102 (1988) and the rules promulgated thereunder and constitute a basis for the Panel to take disciplinary action against the Respondent. Respondent agrees that the stipulated facts enumerated above constitute a reasonable basis in law and fact to justify disciplinary action by the Panel.

* * *

6. Effective April 1, 1990, Respondent voluntarily withdrew his registration as a QRC with the State of Minnesota, recognizing his responsibility for the stipulated facts enumerated above.

* * *

9. The Commissioner and Respondent have jointly agreed that imposition of a \$1,000 penalty by the Panel would be an appropriate disciplinary action, based on the stipulated facts enumerated above.

* * *

12. Respondent acknowledges that the Commissioner and the Unit have made no representations or promises to him regarding the issuance of a QRC registration to him in the future. The Commissioner and t

NOW, THEREFORE, IT IS HEREBY AGREED, that Respondent shall pay a \$1,000 civil penalty, payable to "Commissioner of Labor and Industry", as provided for by Minn. Stat. § 176.102, subd. 3(a). Payment shall be made within 30 days of the date this Order is served on Respondent, either personally or by United States Mail.

IT IS FURTHER AGREED that Respondent shall not apply with the Commissioner for registration as a QRC unless and until Appellant complies with any and all applicable statutes and rules governing the practice of QRCs, including passing the CRCC or CIRS examination required by Minn. Rules pt. 5220.1400.

On December 17, 1990, Appellant filed an Application for Approval and Registration as a Rehabilitation Consultant Independent/Intern. On January 30, 1991, the Commissioner served and filed a Decision and Order denying Appellant's application. The Decision and Order set forth the following "rationale":

Mr. Gaston has submitted an application to the Certified Insurance Rehabilitation Specialist Commission, which administers the examination for certification as a Certified Insurance Rehabilitation Specialist (CIRS). Eligibility for certification as a CIRS is one of the criteria for registration as a Qualified Rehabilitation Consultant Intern under Minn. Rules pt. 5220.1400. This same rule states that substantiated complaints about professional behavior or services, or failure to comply with laws, rules, or decisions and orders are grounds for denial of registration as a Qualified Rehabilitation Consultant/Intern. The Stipulation of Facts and Order served on July 17, 1990, substantiate a complaint that Mr. Gaston knowingly misrepresented that he had passed the examination for certification as a Certified

Rehabilitation Counselor (CRS) in violation of Minn. Rules pt. 5200.1805 (B), Minn. Rules pt. 5220.1400, subp. 2 and Minn. Rules pt. 5220.1300, subp. 2. The R-20, "Application for Approval and Registration as a Rehabilitation Consultant Independent/Intern" is denied on these grounds.

Appellant duly appealed the Decision and Order and that appeal is the subject of this matter pursuant to a Notice of and Order for Hearing and Statement of Issues issued by the Panel on March 7, 1991.

Appellant passed the April 1991 Certified Insurance Rehabilitation Specialist examination and, on June 5, 1991, submitted an Application for Approval and Registration as a Rehabilitation Consultant Independent and an Application for Renewal of Qualified Rehabilitation Consultant Registration. In a Decision and Order served and filed July 15, 1991, the Commissioner denied the applications. The "rationale" set forth in that Decision and Order stated as follows:

The Decision and order of January 30, 1991, outlines the reasons the Department has denied Mr. Gaston's application for registration as a Qualified Rehabilitation Consultant/Intern. That matter was scheduled for hearing on May 28, 1991, and was postponed at Mr. Gaston's request.

Regarding Mr. Gaston's current application for reinstatement of registration as a QRC, Minn. Rules pt. 5200.1500, subp. 4, regarding nonrenewal and suspension of registration states "(a) qualified rehabilitation consultant or intern may apply for reinstatement by providing verification to rehabilitation and medical services of his or her attendance at all annual update sessions and fulfillment of continuing education requirements as provided by parts 5220.0100 to 5220.1900

Certificates of attendance were handed out to all participants at the end of the Update sessions in 1990. Participants were asked to complete the certificates and turn them in at the registration desk prior to leaving. Original certificates of attendance are placed in each individual's QRC registration file. There is no such certificate of attendance in Mr. Gaston's registration file.

Mr. Gaston's application for reinstatement of registration as a QRC is denied because he didn't attend the 1990 session of Rehabilitation and Medical Affairs annual QRC and Vendor Update, and for the same reasons regarding substantiated complaints about professional behavior as are outlined in the January 30, 1991, Decision and Order.

Appellant duly appealed the July 15, 1991 Decision and Order and a Notice of and Order for Hearing was issued by the Panel on August 23, 1991, setting the

matter for hearing and consolidating it with the appeal of the January 30, 1991 Decision and Order.

Appellant argues that the settlement of the prior administrative proceeding dictated disciplinary measures for the past misconduct and bars reassertion of that same misconduct as a basis for further disciplinary action.

He also argues that the Stipulation is ambiguous and must be construed in a light most favorable to him. Appellant also argues that the past misrepresentation should not be the basis for additional disciplinary action based on estoppel principles of fairness and judicial efficiency.

The Commissioner argues that the prior proceeding and Stipulation did not resolve Appellant's status for future registration but, to the contrary, expressly reserved the issue for future determination.

Analysis

As a general rule, prior misconduct that was the basis for discipline of a licensee may be asserted as a basis for discipline in a subsequent proceeding.

With regard to attorneys, the Minnesota Supreme Court has stated:

The purpose of disciplining an attorney is not to punish him but to guard the administration of justice and protect the public interest. While the court should be slow to disbar an attorney, it should be even more cautious in readmitting to practice. Stronger proof of good moral character and trustworthiness should be required than in an original admission. The burden of producing such proof is upon applicant.

In Re Strand, 259 Minn. 379, 107 N.W.2d 518 (1961). Similarly, it has been held that the legislative purpose in authorizing the suspension or revocation of a health professional's license for a felony conviction is to protect the public interest and not to impose a second penalty for the criminal offense involved. Reidinger v. Optometry Examining Board, 81 Wis. 2d 292, 260 N.W.2d 270 (1977). Likewise, the primary purpose of licensing and disciplining QRCs,

as any licensed profession, is the protection of the public. The duties of QRCs are such that they must be free from financial incentives for prescribing

unnecessary and costly rehabilitative services, Metropolitan Rehabilitation Services, Inc. v. Westberg, 386 N.W.2d 698 (Minn. 1986), and the position thus

requires a high degree of trustworthiness and independence. It is conceivable

that a single instance of professional misconduct may be so serious as to justify revocation or suspension and the denial of subsequent requests for reinstatement or registration in order to protect the public.

On the other hand, upon an application for reinstatement, an agency cannot

deny the application simply based upon the prior misconduct without relating the prior misconduct to the protection of the public under the present circumstances. Reidinger v. Optometry Examining Board, supra. Moreover, the applicant has the opportunity to demonstrate that he or she has been

Stat. § 364.03, subd. 3, a person convicted of a crime which directly relates to an occupation for which a license is sought may not be disqualified if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the occupation. A similar criminal offender rehabilitation statute in Michigan was held to apply to a physician seeking reinstatement after having been suspended for inappropriate drug prescribing activities, but for which he had not been criminally convicted. In Re Theuerle, 172 Mich. App. 794, 432 N.W.2d 443 (1988), vacated, Theuerle v. Michigan Board of Medicine, 433 Mich. 870, 445 N.W.2d 443 (1989), (Vacating the

Court of Appeals decision and remanding to the Board of Medicine with instructions to reconsider in light of the criminal offender rehabilitation statute and other statutes.) Similarly here, the Legislature has declared it to be the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders. If a person convicted of a crime is entitled to demonstrate rehabilitation and present fitness to perform the duties for which a license is sought, then, certainly, a person disciplined for

non-criminal misconduct such as civil fraud is likewise entitled to show rehabilitation and present fitness. Of course, the burden of proof is upon the

applicant to make such a demonstration. 53 C.J.S., Licenses, Section 63; In Re Strand, 259 Minn. 379, 107 N.W.2d 518 (1961); Margoles v. Wisconsin State Board of Medical Examiners, 47 Wis. 2d 499, 177 N.W.2d 353 (1970).

In summary, in the absence of an agreement to the contrary, the Commissioner would have the right to assert Appellant's admitted misrepresentation, for which he has already been disciplined, as the basis for

the denials of Appellant's subsequent applications, but must make some demonstration that the misrepresentation continues to have a bearing on Appellant's registration. Also, Appellant would be allowed to demonstrate that

he has been rehabilitated and is presently fit for registration and could do so

by presenting evidence of the sort specified in Minn. Stat. § 364.03, subd. 3.

Appellant asserts that through the terms of the Stipulation, the Commissioner has waived his right to assert the prior misrepresentation in the

present proceedings or is otherwise estopped from asserting the misrepresentation. Waiver and estoppel are not convertible terms. An estoppel

may exist where there is also a waiver, but waiver may be established even though the acts, conduct or declarations are insufficient to establish an estoppel. Engstrom v. Farmers and Bankers Life Ins. Co., 230 Minn. 308, 41 N.W.2d 422 (1950). A waiver is a voluntary and intentional relinquishment or abandonment of a known right. State v. Tupa, 194 Minn. 488, 260 N.W. 875 (1935); Zontelli v. Smead Mfg., 343 N.W.2d 639 (Minn. 1984); Montgomery Ward and Co., Inc. v. County of Hennepin, 450 N.W.2d 299 (Minn. 1990). For equitable estoppel to apply against the Commissioner, Appellant must prove:

1. That representations or inducements were made by the Commissioner that involve some element of fault or wrongful conduct;
2. That there has been reasonable reliance on those representations or inducements by Appellant;
3. That Appellant will be harmed if estoppel is disallowed; and
4. That the equities of the case outweigh any public interest frustrated by the estoppel.

Brown_v._Minnesota_Dept._of_Public_Welfare, 368 N.W.2d 906 (Minn. 1985);
In_Re
Emmanuel_Nursing_Home, 411 N.W.2d 511 (Minn. App. 1987); In_Re_Westling
Manufacturing,_Inc., 442 N.W.2d 328 (Minn. App. 1989).

By voluntarily resigning his registration and agreeing to a \$1,000.00 penalty in 1990, Appellant received the maximum sanctions that could be imposed by the Panel.¹ In the Stipulation, the Commissioner and Appellant agreed that the misrepresentation co

Under these facts, there has been no waiver by the Commissioner of his right to assert the prior misrepresentations as a grounds for denying subsequent applications. There are no words to that effect and there is nothing in the Stipulation to indicate that that was intended. Nor is there any ambiguity on this issue in the Stipulation. It fairly clearly states that Appellant may apply for registration when he meets all the requirements and states that if the Commissioner denies the application, Appellant may appeal that decision. The Stipulation does not specifically state that Appellant would have an opportunity to show that he was in fact qualified and could not automatically be disqualified because of the prior misrepresentations, but that can be fairly implied. Otherwise, the provisions of the Stipulation allowing him to apply in the future would have been meaningless. However, the provisions allowing him to apply in the future do not go so far as saying he will be registered without further qualification if he obtains CRCC certification. Thus, there has been no waiver.

¹ The Commissioner states that the need to proceed and determine whether revocation or suspension was appropriate was eliminated through Appellant's voluntary withdrawal prior to the 1990 hearing. The Administrative Law Judge would note that many licensing boards will not accept a unilateral surrender of the license while disciplinary proceedings are pending. In this case, the

withdrawal was incorporated into the Stipulation with a statement that Appellant did so recognizing his responsibility for the misrepresentations.

Equitable estoppel does not apply in this case. First, there were no representations or inducements by the Commissioner involving any element of false or wrongful conduct. Second, Appellant has not demonstrated that he will

be harmed if the estoppel is disallowed. The only "harm" coming to Appellant is that he will be required to demonstrate his rehabilitation and present fitness for registration at a hearing. It may have been preferable for the Commissioner to have asked Appellant to provide such evidence before summarily

denying the applications based on the prior misconduct, but Appellant will be able to present such evidence through the current appeals. Lastly, and most importantly, the public interest in assuring that QRCs are trustworthy requires

that the issues surrounding the misrepresentations and Appellant's rehabilitation and current fitness be thoroughly explored before allowing him to be registered. Therefore, equitable estoppel does not bar the Commissioner's assertion of the prior misrepresentations.

Because the Stipulation does not create any waiver or estoppel barring the assertion of the prior misrepresentations, this matter must proceed to hearing

to allow the Commissioner to present facts and argument as to why the prior misrepresentation and other grounds alleged in the Decision and Order of July 15, 1991, should cause Appellant's applications to be denied and for Appellant

to present facts and arguments as to why they should not.

SMM